IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-938

COX BROADCASTING CORPORATION
and
THOMAS WASSELL,
Appellants,

vs.

MARTIN COHN,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF GEORGIA

JURISDICTIONAL STATEMENT

KIRK M. MCALPIN
JOHN A. PICKENS
JOSEPH R. BANKOFF
CHARLES H. TISDALE, JR.
2500 Trust Company
of Georgia Building
Atlanta, Georgia 30303
Attorneys for Appellants

OF COUNSEL
KING & SPALDING

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JUDISDICTIONAL STATEMENT

OPINIONS BELOW

The decision and opinion on rehearing of the Supreme Court of Georgia is reported at 231 Ga. 60, — S.E.2d — (1973) and is set forth in Appendix A, *infra* pp. A9-A26. The Opinion of the Superior Court of Fulton County in this cause is not reported but is set forth in Appendix A, *infra* pp. A1-A6.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2), this being an appeal which draws into question the validity of Ga. Code Ann. § 26-9901 *infra*, p. 5, on grounds that it is repugnant to the Constitution of the United States.

Appellants appeal from a judgment of the Supreme Court of Georgia in a civil action for invasion of privacy. The court below ruled that appellants may be held liable for damages for the truthful publication of the name of a deceased victim of a murder-rape in the course of a truthful news story concerning the public trial of those accused of the crime. The news story was broadcast on the day of the trial.

The Georgia Supreme Court expressly held that the Georgia criminal statute (Ga. Code Ann. § 26-9901) prohibiting disclosure of the name of a victim of a rape or attempted rape does not violate the First Amendment to the Constitution of the United States.[1] The Court further held that because of this statute the disclosure of the identity of the victim of such a crime is not a matter of public interest and general concern in the State of Georgia.[2] The Court remanded the case to the trial court with instructions to submit the case

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1 "We hold that this 1968 Georgia statute is not unconstitutional, ..." 231 Ga. at 69, Appendix p. A26.

2 ". . . and because of this statute the disclosure of the identity of the victim of such a crime is not a matter of public interest and general concern in this state." 231 Ga. at 69, Appendix p. A26.

to the jury to determine if "reasonable men would find the invasion highly offensive."[3]

Thus there has been a final ruling that appellants' activities were not protected by the First Amendment, and a final ruling that Georgia Code Ann. § 26-9901 does not abridge First Amendment freedom of expression. This judgment gives rise to a situation which fully meets the criteria for finality set forth by this Court in *Local No. 438 v. Curry*, 371 U.S. 542 (1963); *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963); *Brady v. Maryland*, 373 U.S. 83 (1963); *Rosenblatt v. American Cynamid Co.*, 86 S. Ct. 1, 15 L.Ed.2d 39 (1965). In each of these cases this Court has found the requirement of finality satisfied by decisions of the highest state court despite the fact that further proceedings in lower state courts were required.

Although remanding this case to the Georgia trial court for further proceedings, the judgment of the Supreme Court of Georgia is binding upon the trial court and not subject to further review in Georgia. The decision of the Georgia Court seriously erodes the protection afforded newscasters by the First Amendment.[4] The federal claim presented for review here is separate from the issues still to be determined in a state court trial, i.e., whether appellants' actions invaded appellee's right of privacy, and if so, to what

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3 231 Ga. at 64, Appendix p. A17.

4 *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *Time Inc. v. Hill*, 385 U.S. 374 (1967); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

extent. Determination of appellants' First Amendment claim may avoid a long and costly trial and subsequent appeals. Finally, appellants' claim does present a question which is fundamental to the case and yet is independent of what will be in issue at the trial.

Accordingly, this matter is appropriately brought to this Court by appeal under the authority of the above cited decisions.

The decision of the Supreme Court of Georgia was rendered on September 5, 1973. On September 19, 1973 a petition for rehearing was denied. Timely notice of appeal to this Court was filed in the Supreme Court of Georgia and the Superior Court of Fulton County, Georgia on December 6, 1973.

In the alternative, should this Honorable Court not consider this appeal as the appropriate mode of review, appellants respectfully request that the papers whereupon this appeal is taken be regarded and acted upon as a Petition for a Writ of Certiorari pursuant to 28 U.S.C. § 2103.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provisions which appellants contend have been violated by the judgment of the Supreme Court of Georgia are the following clauses of the First Amendment to the Constitution of the United States, to wit:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

and the following clause of the Fourteenth Amendment to the Constitution, to wit:

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; . . ."

This case also involves 1968 Ga. Laws 1335-1336 (Ga. Code Ann. § 26-9901) which provides:

> "It shall be unlawful for any news media or any other person to print and publish, broadcast, televise, or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised, or disseminated in any newspaper, magazine, periodical or other publication published in this State or through any radio or television broadcast originating in the State the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made. Any person or corporation violating the provisions of this section shall, upon conviction, be punished as for a misdemeanor."

QUESTIONS PRESENTED

1.

Whether Ga. Code Ann. § 26-9901, as construed by the Georgia Supreme Court to prohibit the publication of the name of the deceased victim in connection with the truthful news account of the trial of those accused of the victim's murder and rape is unconstitutionally overbroad or otherwise in violation of the freedom of speech and press clauses of the First Amendment as

applied to the states through the Fourteenth Amendment to the Constitution of the United States?

2.

Whether Ga. Code Ann. § 26-9901, as construed by the Georgia Supreme Court to conclusively determine that disclosure of the identity of the victim of a rape or an attempted rape is not a matter of public interest and general concern in the State of Georgia, and to prohibit all such disclosures violates the freedom of speech and press clauses of the First Amendment as applied to the states through the Fourteenth Amendment?

3.

Whether, consistent with the requirements of the First and Fourteenth Amendments to the United States Constitution, the legislature has the power to prohibit the publication of an item of public record as not being a matter of public interest and general concern in the State?

4.

Whether the judgment that a news media and its reporters may be held liable for damages for the truthful publication of the name of a deceased victim of a murder-rape in the course of a timely news story concerning the trial of those accused of the crime violates the freedom of speech and press clauses of the First Amendment as applied to the states through the Fourteenth Amendment?

5.

Whether liability may be imposed for the truthful publication of information which standing alone may not be of public interest where such information is published as a part of a report otherwise concerning a matter of public interest and therefore privileged?

STATEMENT OF THE CASE

Appellant Cox Broadcasting Corporation, the licensee and operator of WSB-TV in Atlanta, Georgia, and appellant Thomas Wassell, at the time a staff news reporter for WSB-TV, have been sued by the appellee, Martin Cohn, for invasion of privacy arising from the appellants' televised news coverage relating to the trial of six young defendants indicted for the murder and rape of the appellee's daughter, Cynthia Leslie Cohn.

Cynthia Leslie Cohn died on August 18, 1971 under circumstances that resulted in the indictment on March 3, 1972 of six young men for her murder and rape.

On April 10, 1972, appellant Wassell, acting in his capacity as a news reporter for WSB-TV, attended the trial of the six youths held in open court at the Fulton County Courthouse. Following the proceedings in open court, appellant Wassell prepared a news report which was subsequently filmed on the steps of the Fulton County Courthouse. This news report was based on information obtained at the trial and from the indictments on record with the clerk of the Superior Court of Fulton County.

The filmed news report related solely to the court proceedings, wherein five of the six defendants entered guilty pleas to charges arising from the death of Cynthia Leslie Cohn, while one defendant first pleaded guilty but during the proceedings, withdrew his plea and demanded a jury trial. In the course of this filmed news report appellant Wassell identified the crimes of murder and rape with which these defendants were charged by reference to the name of the deceased victim, Cynthia Cohn. The sole reference to the victim's name was contained in the opening of the filmed report:

> "Six youths went on trial today for the murder-rape of a teenaged girl.
>
> "The six Sandy Springs high school boys were charged with murder and rape in the death of seventeen year old Cynthia Cohn following a drinking party last August 18.
>
> "The tragic death of the high school girl shocked the entire Sandy Springs community. Today the six boys had their day in court.
>
> "There was no jury. The six boys, through their lawyers, threw themselves on the mercy of the court . . . and the presiding judge, Sam Phillips McKenzie."

The filmed news report went on to relate the names of the six boys and the fact that the murder charges were dropped against all of the defendants. The news report indicated that one defendant withdrew his guil-

ty plea and reported pleas of guilty by five of the defendants to charges of rape and the sentences each received.

This filmed news report was thereafter televised over WSB-TV during the course of its regularly scheduled news programs at 6:00 p.m. on April 10, 1972 and again during the early morning hours of April 11, 1972.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

On May 8, 1972, appellee Martin Cohn filed his Complaint against appellants alleging that appellants had televised or caused to be televised willfully, unlawfully and negligently the name of the appellee's deceased daughter, Cynthia Leslie Cohn as the victim of a rape and attempted rape, contrary to Ga. Code § 26-9901 and further alleging that the broadcast invaded appellee's right of privacy.

Appellants answered this Complaint on June 7, 1972 and asserted, inter alia, that their actions were privileged under the First and Fourteenth Amendments to the Constitution of the United States. Appellants amended their Answer on October 24, 1972 to add the additional affirmative defense that Ga. Code Ann. § 26-9901 was an unconstitutional prior restraint on freedom of speech and press in violation of the First and Fourteenth Amendments to the Constitution of the United States.

There being no dispute as to any material fact, the

appellants and the appellee filed with the trial court cross motions for summary judgment with accompanying affidavits.

On December 13, 1972, the Superior Court of Fulton County entered an order and written opinion (Appendix pp. A1-A6) granting the appellee's motion for summary judgment as to the issue of liability and denying the appellants' motion for summary judgment. The court held that Georgia Code Ann. § 26-9901 stated a rule of civil conduct which the appellants had violated by their actions and for which they were liable for damages. The court ruled:

> "In the opinion of the court said law is not unconstitutional as a rule of civil conduct for any reason set forth in the pleadings of this case.
>
> Said law is restrictive of speech and press, but not unreasonably so, and here the privileges and liberties in this regard must yield to the public good and individual liberties."

On December 22, 1972, the appellants filed a Motion to Reconsider in the Superior Court of Fulton County with respect to that court's order of December 13, 1972. In this Motion the appellants again raised the federal issues for the court's consideration.

On December 29, 1972, the Superior Court reaffirmed and adhered to its order and opinion of December 13, 1972 and certified that the order should be subject to review by direct appeal.[5]

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5 This Certificate was issued pursuant to Georgia Code Ann. § 81A-156(h) which provides:

On January 9, 1973 the appellants appealed the orders of December 13 and 29, granting the appellee's motion for summary judgment on the issue of liability and denying the appellants' motion for summary judgment to the Supreme Court of Georgia. In this appeal the appellants asserted that their actions were privileged under the First and Fourteenth Amendments to the United States Constitution [Appellants' Assignment of Error No. 4, 10] Appellants further asserted that Georgia Code Ann. § 26-9901, to the extent that it applies to the actions of appellants, violates the First and Fourteenth Amendments to the United States Constitution. [Appellants' Assignment of Errors No. 12, 13]

The Supreme Court of Georgia, in a divided opinion, (4-3), affirmed the judgment of the trial court in part, reversed in part and remanded with direction. The Court held that Georgia Code Ann. § 26-9901 does not give rise to a civil cause of action and unanimously reversed the entry of summary judgment for the appellee on the issue of liability. 231 Ga. at 62, Appendix, *infra* pp. A12-A13.

"An order granting summary judgment on any issue, or as to any party, shall be subject to review by appeal; but an order denying summary judgment is not subject to review by direct appeal or otherwise, unless within ten days of the order of denial the trial judge certifies that the order denying summary judgment as to any issue or as to any party should be subject to review, in which case such order shall be subject to review by direct appeal."

A certificate of review was also granted following the Superior Court's initial decision on December 13, 1972.

But a majority (4-3) of the Court affirmed the denial of the appellants' motion for summary judgment. The Court expressly considered the "head-on collision between the tort of public disclosure and First Amendment rights of freedom of speech and press." The majority (4-3) of the Court concluded:

> "First Amendment proscriptions do not bar the claim of the appellee against the appellants in this case." 231 Ga. at 66. Appendix p. A21.

Three dissenting Justices of the Georgia Supreme Court concluded that the actions of the appellants were privileged as a publication of information regarding a matter of public interest. 231 Ga. at 67. Appendix p. A22.

The appellants moved for rehearing in the Supreme Court of Georgia and once again asserted their claims of privilege under the First and Fourteenth Amendments to the Constitution of the United States.

> "However, the majority has overlooked the unbroken line of controlling authority in which the United States Supreme Court, since 1964, has held that the news media is *constitutionally privileged* to publish *truthful accounts of matters of general or public concern*, for which no criminal sanction or civil damages may be imposed. See e.g., *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 29 L. Ed. 2nd 296 (1971); *Time, Inc. v. Hill*, 385 U.S. 374, 17 L. Ed. 2d 456 (1967); *New York Times Company v. Sullivan*, 376 U.S. 264, 11 L. Ed. 2d 686 (1964); *Garrison v. Louisiana*, 379 U.S. 64, 13 L. Ed. 2d 125 (1964)."

On September 19, 1973, the Supreme Court of Georgia denied the appellant's Motion for Rehearing and expressly ruled that the 1968 Georgia Criminal Statute (Ga. Code Ann. § 26-9901) was constitutional. The Court held that this statute conclusively determined that the disclosure of the identity of the victim of a rape or an attempted rape is not a matter of public interest and general concern in the State of Georgia and such a disclosure was not within the protection of the First Amendment:

> "A majority of this Court does not consider this statute to be in conflict with the First Amendment. We think the General Assembly of Georgia had a perfect right to declare that the victim of such a crime should not be publicly identified by the news media. The First Amendment is not absolute; and we consider this statute to be a legitimate limitation on the right of freedom of expression contained in the First Amendment.
>
> "There simply is no public interest or general concern about the identity of the victim of such a crime as will make the right to disclose the identity of the victim rise to the level of First Amendment protection.
>
> . . .
>
> "We hold that this 1968 Georgia statute is not unconstitutional, and because of this statute the disclosure of the identity of the victim of such a crime is not a matter of public interest and general concern in this State." 231 Ga. at 68-69, Appendix pp. A24-A26.

Thus, the Supreme Court of Georgia passed on the

Federal questions raised by appellants, including the constitutionality of Ga. Code Ann. § 26-9901, and determined that said statute did not violate the First Amendment of the Constitution of the United States and that the appellants actions were not privileged under the First Amendment of the Constitution of the United States.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

1.

The judgment of the Georgia Supreme Court presents the substantial question whether, consistent with the requirements of the First and Fourteenth Amendments to the United States Constitution, the legislature has the power to prohibit publication of an item of public record as not being a matter of public interest and general concern in the State.

The judgment of the Supreme Court of Georgia holds that the legislature has the power to withdraw the First Amendment protection afforded to the publication of truthful facts concerning matters of court record and public interest by enacting a legislative determination that a particular type of public information, here the name of a deceased victim of a rape, is never a matter of public interest and general concern.

In its opinion on rehearing the court held:

"We think the General Assembly of Georgia had a perfect right to declare that the victim of such a

crime should not be publicly identified by the news media.

. . .

. . . and because of this statute the disclosure of the identity of the victim of such a crime **is not a matter of public interest and general concern in this State.**" 231 Ga. at 68-69, Appendix pp. A24-A26.

This grave intrusion into the area of expression protected by the First Amendment, is unsupported by discussion or even citation of a single opinion of this Court in the majority opinion for the Georgia Supreme Court.

It is apparent that this recognition of the legislature's power to determine what is in the "public interest and general concern" and to thereby preclude publication and discussion of public facts has far broader implications than the limitations imposed under the facts of this case.

This Court has not had occasion to examine the question although, in a number of cases, this Court has ruled that publication of information was within the protection of the First Amendment because it was a matter of public concern. See, e.g., *Time, Inc. v. Hill*, 385 U.S. 374 (1967). The Court held:

> "We have no doubt that the subject of a *Life* article, the opening of a new play linked to an actual incident, is a matter of public interest." 385 U.S. at 388.

In *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971) this Court held that the publication of reports of court

actions by news media would not support a libel action in the absence of a showing of actual malice as defined in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In *Rosenbloom* the petitioner conceded that the police campaign to enforce the obscenity laws was an issue of public interest and therefore within the constitutional guaranties of freedom of speech and press. 403 U.S. at 40.

The sweeping language contained in Ga. Code Ann. § 26-9901 prohibits publication of the names of the victims in all instances including those in which, the appellants submit, the publication of the names of the victims would be matters of legitimate public interest. Thus the sweep of the Georgia statute is unnecessarily broad and invades areas of public freedoms. See *Cantwell v. Connecticut*, 310 U.S. 296, 84 L. Ed. 1213 (1940); *Shelton v. Tucker*, 364 U.S. 479, 5 L. Ed. 2d 231 (1960); *Elfbrandt v. Russell*, 384 U.S. 11, 16 L. Ed. 2d 231 (1966).

The appellants submit that the effect of the statute is to unnecessarily restrict the free and open discussion of matters of public record, actions of public officials and issues of public concern.

Accordingly, appellants respectfully submit that the judgment of the Supreme Court of Georgia raises a very substantial federal question, the resolution of which is of vital importance to the institution of a free press.

2.

The judgment of the Georgia Supreme Court is contrary to the holdings of the United States Su-

preme Court that no civil or criminal penalty may be imposed upon the truthful publication of matters of public interest.

Under the decisions of this Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); and *Rosenbloom v. Metromedia, Inc.* 403 U.S. 29 (1971) published reports by news media, relating to public officials, public figures and matters of general or public concern, have been held to be privileged in the absence of malice consisting of reckless disregard of the truth or knowledge of the actual falsity of the report.

Appellants believe that the decision of the Georgia Supreme Court squarely contravenes the holding of this Court in *Time, Inc. v. Hill, supra.* This Court there denied recovery for an invasion of privacy where the report was false in fact. In the present case there is no question that the report published by these appellants was truthful. In *Time, Inc. v. Hill, supra,* this Court held that the publication concerning the opening of a play on Broadway was a matter of public interest and therefore privileged. The report in the present case concerns the public trial of those accused of murder and rape, a matter clearly of public interest.

The appellants further contend that the decision of the Georgia Supreme Court conflicts directly with the holding of this Court in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). Although this Court in *Rosenbloom,* was unable to agree on a majority opinion it appears that the decision of the Georgia Supreme Court is contrary to the narrowest privilege afforded

by any of the plurality opinions in *Rosenbloom*. Mr. Justice White concluded that, in the absence of actual malice as defined in *New York Times, supra*, the First Amendment gives the news media privilege to report and comment upon the official actions of public servants in full detail, without sparing from public view the reputation or privacy of an individual involved in or affected by any official action. 403 U.S. at 62.

The report published by appellants here concerned a public trial wherein the charges and pleas were changed and reduced, and sentences were imposed by the court on those accused of a particularly notorious crime. Thus the report was in essence a report and comment upon the actions of public officials and privileged under the narrowest reading of *Rosenbloom*.

The judgment of the Georgia Supreme Court is also directly contrary to the holdings of this Court that the First and Fourteenth Amendments to the Constitution of the United States prohibit the infliction of either civil damages or criminal penalties upon one who publishes a truthful account about a matter of public concern. *Garrison v. Louisiana*, 379 U.S. 64, (1964); *Kois v. Wisconsin*, 408 U.S. 229 (1972).

Mr. Justice Undercofler speaking for the three dissenting justices of the Georgia Supreme Court in the case at bar recognized the impact that the decisions of this Court have had in the areas of reports concerning matters of public interest:

> "The constitutional freedoms of press and speech are so jealously guarded that even publication of *false* reports of matters of public interest are privi-

leged absent a showing that the defendant 'published the report with knowledge of its falsity or in reckless disregard of the truth.' *Time, Inc. v. Hill*, 385 U.S. 374, 388 (87 SC 534, 17 L. Ed. 2d 456). Certainly the publication of true information regarding matter of public interest can be no less privileged. The constitutional privilege is controlling regardless of whether recovery would be predicated on violation of statute, or on some theory akin to negligence per se with the statute providing the duty or standard of care owed the plaintiff, or, as the majority would have it, on the basis of 'that reasonable men would find the invasion highly offensive.' 231 Ga. at 67-68, Appendix pp. A22-A23.

Thus the majority decision and judgment of the Supreme Court of Georgia seriously erodes the protection afforded appellants by the First and Fourteenth Amendments to the United States Constitution.

3.

Assuming that the publication of the victims name is not of itself privileged as a matter of public interest, the judgment of the Georgia Supreme Court raises the question of whether liability may be imposed for the truthful publication of such information in the course of a report otherwise concerning a matter of public interest and therefore privileged.

Assuming, arguendo, that publication of the name of the victim is not, of itself, privileged under the First and Fourteenth Amendments, the question still re-

mains whether the appellants may be subjected to liability for the publication of such information in the course of a report otherwise dealing with a matter admittedly of official record and public concern.

In *New York Times v. Sullivan*, 376 U.S. 254 (1964), this Court concluded that a rule which compelled the critic of official conduct to guarantee the truth of all his factual assertions and to do so on pain of a libel judgment would lead to "self-censorship." 376 U.S. at 279. Consequently, this Court held that the First Amendment required a rule which protected even erroneous statements unless such statements were made with actual malice. 376 U.S. at 279-290.

In similar fashion, the judgment of the Georgia Supreme Court which permits a newsman to be held liable for damages for the broadcast of a particular fact which is subsequently held not to be a matter of public interest, will lead inevitably to self-imposed restrictions on what matters are broadcast to the public. Such self-censorship is inconsistent with the First Amendment. Permitting a newscaster to broadcast some matters which arguably may not be in the public interest is absolutely essential to insuring that all matters of public interest are broadcast. In disseminating information to the public a broadcaster must be given some latitude. Otherwise, First Amendment freedom of expression will not have the "breathing space" that it needs to survive. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

Appellants would submit that the constitutional protection afforded the publication of matters of public interest includes the publication of a fact which of

itself is arguably not a matter of public interest and concern where it is published as a part of a report concerning a matter of public interest.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

KIRK M. MCALPIN

JOHN A. PICKENS

JOSEPH R. BANKOFF

CHARLES H. TISDALE, JR.
Attorney for Appellants

KING & SPALDING
2500 Trust Company
of Georgia Building
Atlanta, Georgia 30303
404/658-1350

CERTIFICATE OF SERVICE

I, Kirk M. McAlpin, counsel for Appellants, hereby certify that I have served a copy of the foregoing Jurisdictional Statement by depositing a copy of the same in the United States Mail, properly stamped and addressed, to:

Mr. Stephen A. Land
Zachry & Land
1505 Fulton National Bank Building
Atlanta, Georgia 30303

This day of December, 1973.

KIRK M. MCALPIN